PARTIES

In addition to the parties listed in the caption, the following parties were defendants below and are respondents in this case:

Bruce Davis

Regina Mickamisse

Jim Overman

Robert Goodwyn

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cheryl Blanchard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's unpublished order granting respondents' motion for summary judgment and dismissing this action is reproduced in the appendix ("Pet. App.") at 10-19. The Ninth Circuit's December 3, 2007 opinion affirming the district court's order is published at __ F.3d __ (9th Cir. 2007) (*Blanchard II*), and is reproduced at Pet. App. 1-9. That opinion modified *sua sponte* the opinion the court of appeals earlier issued on September 20, 2007.

Ms. Blanchard also appealed an earlier order of the district court. That earlier order, dismissing Ms. Blanchard's claims on exhaustion grounds, which is not officially reported, is reproduced at Pet. App. 28-30. The Ninth Circuit's opinion reversing that order is published at 420 F.3d 918 (9th Cir. 2005) (*Blanchard I*), and is reproduced at Pet. App. 20-27.

JURISDICTION

The Ninth Circuit filed its original opinion on September 20, 2007. On December 3, 2007, the court

of appeals issued *sua sponte* a modified opinion. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 1415(*l*) of Title 20 to the United States Code provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Section 1983 of Title 42 to the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in

an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Sections 1415(i)(2)(A)-(C) of Title 20 to the United States Code provide:

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for

bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court—

(i) shall receive the records of the administrative proceedings;

(ii) shall hear additional evidence at the request of a party; and

(iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

STATEMENT OF THE CASE

This petition arises out of Cheryl Blanchard's ongoing effort—already spanning more than eight years—to ensure that her autistic son, Daniel Blanchard, receives the free appropriate public education mandated by the Individuals with Disabilities Education Act ("IDEA"). The issues regarding Daniel's educational needs initially arose in 1999 when he transferred into the first grade in the Morton School District. This is an action seeking damages for financial losses and injuries sustained by Ms. Blanchard as a result of the respondents' repeated violations of the IDEA. Whether petitioner can recover such relief turns on whether § 1983 provides a cause of action to

enforce the IDEA, a question on which the courts of appeals are sharply divided.

I. THE YEARS OF ADMINISTRATIVE PROCEEDINGS AND COMPLAINTS

In September 1999, first-grader Daniel Blanchard transferred into the Morton School District. Because Daniel was autistic, the IDEA required that the District provide him with a "free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), and adopt for him an effective individualized education plan ("IEP"). Less than a month after Daniel enrolled in the first grade, Ms. Blanchard objected that he was not being provided with the appropriate education mandated by the IDEA.

After Ms. Blanchard's complaints to school officials failed to bring about the needed action, she requested a formal due process hearing required by the IDEA. At that hearing, held over three days in April 2000, Ms. Blanchard represented herself and her son. The District, represented by counsel, called a series of witnesses, including three experts. Despite the obvious disadvantages in proceeding pro se against a defendant represented by skilled counsel and outside experts, Ms. Blanchard prevailed.

The administrative law judge ("ALJ") concluded that "[t]he District's failure to implement the IEP as adopted, failure to revise the IEP when it determined that it was inappropriate, and failure to get the training necessary to properly implement the IEP has

resulted in a denial of" the free appropriate public education to Daniel mandated by the IDEA. E.R.[1] 54. The ALJ made extensive findings regarding the failure of the District to obey the IDEA, identifying at least ten different areas in which the district had "not implemented" the elements of Daniel's IEP, in some cases "wholly" or "completely disregard[ing]" those elements. E.R. 31-52. The ALJ ordered the District to (1) implement Daniel's IEP, including obtaining the necessary training, (2) monitor the implementation of the IEP, including providing monthly progress reports to Ms. Blanchard, and (3) provide compensatory education services to Daniel in order to remedy the District's failure to comply with the IDEA's statutory mandate "during a crucial period in [Daniel's] development." E.R. 54-55.

The 2000 ALJ order, however, was not successful in bringing about compliance with the IDEA. Over the years that followed Ms. Blanchard was forced to file a series of complaints with the District, objecting to repeated violations of Daniel's IEP or to other serious problems. In 2002, following a two-day due process hearing, an ALJ concluded that the District had failed to meet the requirement of the IDEA that it provide Daniel with extended school year services. E.R. 68. In 2003, Ms. Blanchard had to initiate yet another due process hearing, asserting among other

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[1] "E.R." refers to the Excerpts of Record filed with the Ninth Circuit in *Blanchard II*.

things that the District had improperly interfered with an evaluation of Daniel and that the District staff assigned to work with Daniel were not adequately trained or skilled. The issues raised by that complaint were settled after the hearing began. E.R. 148-49. In 2005, Ms. Blanchard filed yet another complaint, this time with the Office of Superintendent of Public Instruction ("OSPI"), asserting that the District had not properly implemented Daniel's IEP in a number of respects, including by failing to provide her with certain required written notices, failing to provide Daniel with a communication device that was required by the IEP, failing to implement portions of the IEP, and failing to prepare adequate progress reports as required by the IEP. E.R. 150. The OSPI sustained Ms. Blanchard's contention that the District did not adequately implement Daniel's IEP. E.R. 150-52. Since 1999, Ms. Blanchard has prevailed at other due process hearings and made additional complaints to the District that were resolved before hearing, or without resort to such a hearing.

II. THE PROCEEDINGS BELOW

Before the end of these administrative proceedings and complaints, Ms. Blanchard filed the complaint at issue here, seeking redress under § 1983 for the asserted violations of the IDEA. The complaint requested damages for the emotional distress and over $25,000 in lost income that Ms. Blanchard had

suffered during her ultimately successful efforts to obtain benefits for Daniel under the IDEA. E.R. 9.

In 2003, the District Court dismissed Ms. Blanchard's complaint, reasoning that she had failed to exhaust administrative remedies under the IDEA. Pet. App. 29-30. In 2005, the Ninth Circuit reversed. The court of appeals held that because Ms. Blanchard sought monetary relief on her own behalf, rather than on behalf of her son, there were no administrative remedies for her to exhaust under the IDEA. Pet. App. 21-22, 25-27. In so holding, it acknowledged that "the remedies available under the IDEA . . . do not provide an adequate remedy for Blanchard." Pet. App. 25 (citation omitted).

On remand, the District court again dismissed Ms. Blanchard's claims as a matter of law. The District Court reasoned that the IDEA only establishes rights for children with disabilities, not for their parents. Because on this view Ms. Blanchard "ha[d] no individually enforceable right under the IDEA," there was no right that she could enforce by means of § 1983. Pet. App. 16.

While this case was again pending on appeal, this Court decided *Winkelman ex rel. Winkelman v. Parma City School District*, __ U.S. __, 127 S. Ct. 1994 (2007). *Winkelman* held that parents themselves, as well as their disabled children, have rights under the IDEA. *Id.* at 2005. The Ninth Circuit recognized that "in light of *Winkelman*, the district

court was not correct in ruling that the IDEA creates no individual rights in parents." Pet. App. 8.

The Ninth Circuit nonetheless affirmed the dismissal of Ms. Blanchard's complaint. The court of appeals reasoned that statutory requirements established by the IDEA can only be enforced in a civil action under the IDEA itself. Pet. App. 4-8; 20 U.S.C. § 1415(i)(2). Although § 1983 ordinarily provides a cause of action to enforce rights created by federal statutes, the court of appeals concluded that the IDEA itself is a "comprehensive . . . scheme" evincing a congressional intent not to permit enforcement of the IDEA by means of a § 1983 action. Pet. App. 8. The court rejected Ms. Blanchard's argument that a 1986 amendment to what is now the IDEA, 20 U.S.C. § 1415(*l*), preserves such § 1983 claims. Pet. App. 6-8.

The court of appeals candidly acknowledged that its decision was in conflict with decisions on the same issue in the Second and Seventh Circuits. "There is an existing circuit split on whether, with the [1986] amendment, Congress intended the IDEA rights to be enforceable under § 1983." Pet. App. 6.

REASONS FOR GRANTING THE PETITION

I. THERE IS A WELL-ESTABLISHED INTER-CIRCUIT CONFLICT REGARDING WHETHER § 1983 PROVIDES A CAUSE OF ACTION TO ENFORCE THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT.

This case presents a mature and intractable inter-circuit conflict regarding whether § 1983 provides a cause of action to enforce the IDEA. This growing conflict has existed for over a decade. Today ten circuits have addressed the question. Four circuits have concluded that § 1983 does provide such a cause of action, and would permit the claim in the instant case to proceed. Six circuits, including the Ninth Circuit in the instant case, have concluded to the contrary that § 1983 cannot be utilized to enforce the IDEA.

This conflict has its roots in this Court's decision in *Smith v. Robinson*, 468 U.S. 992 (1984). *Smith* concerned the availability of a § 1983 action under the Education for All Handicapped Children Act ("EHA"), the statute later superseded by the IDEA.[2] *Smith* held that the EHA itself provides the exclusive

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[2] Many of the provisions in the IDEA were originally enacted as the EHA. In 1990, Congress renamed this legislation the Individuals with Disabilities Education Act. The changes in this legislation, other than the adoption of § 1415(*l*), are not material to this litigation. For simplicity we have substituted bracketed references to the IDEA in decisions that in fact reference the EHA.

means of enforcing any rights related to the education of disabled children in public primary and secondary schools. More specifically, *Smith* concluded that § 1983 could not be utilized to enforce such rights. Noting that the EHA, unlike § 1983, contains a specific exhaustion requirement, the Court reasoned that

> [i]f § 1983 stood as an independent avenue of relief for petitioners, then they could go straight to court to assert it. . . . [Section] 1983 is a statutory remedy and Congress retains the authority to repeal it or replace it with an alternative remedy. . . . In this case, we think Congress' intent is clear. Allowing a plaintiff to circumvent the EHA administrative remedies would be inconsistent with Congress' carefully tailored scheme.

Id. at 1012 (citations and footnote omitted).

In response to *Smith*, Congress adopted the Handicapped Children's Protection Act of 1986. *See* Pub. L. No. 99-372, 100 Stat. 796. Section 3 of that Act, codified in 20 U.S.C. § 1415(*l*), now provides with regard to the IDEA:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws

> seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

The effect of § 1415(*l*) is to permit plaintiffs to seek to utilize "procedures[ ] and remedies" not included in the IDEA itself, provided that they first exhaust any administrative remedies available to them under the IDEA.

The courts of appeals are sharply divided regarding whether the "procedures[ ] and remedies" authorized by § 1415(*l*) include an action under § 1983, including an action under § 1983 to enforce the IDEA, or its predecessor the EHA. The question is important because the remedies provided by § 1983 may not be available under the IDEA itself.

A. The Second, Fifth, Sixth, and Seventh Circuits Have Concluded That § 1983 Provides a Cause of Action to Enforce the IDEA.

The Second Circuit was the first court of appeals to address this question. *Mrs. W. v. Tirozzi*, 832 F.2d 748, 754-56 (2d Cir. 1987). In resolving the issue only a year after the enactment of § 1415(*l*), the Second Circuit relied heavily on the fact that both the House Report and the Conference Report regarding § 1415(*l*)

expressly stated that § 1983 actions would be permitted. *Id.* at 754-55.[3] "In light of this clear legislative history, we hold that parents are entitled to bring a § 1983 action based on alleged violations of the [IDEA]." *Id.* at 755.

In *Weixel v. Board of Education of New York*, 287 F.3d 138, 151 (2d Cir. 2002), the Second Circuit reaffirmed its view that § 1983 provides a cause of action to enforce the IDEA, specifically sustaining a § 1983 action for damages caused by a violation of the IDEA. Earlier this year that court of appeals again reiterated that in the Second Circuit "[i]t is well-settled that, while the IDEA itself does not provide for monetary damages, plaintiffs may sue pursuant to § 1983 to enforce its provisions . . . and to obtain damages for violations of such provisions." *Smith v. Guilford Bd. of Educ.*, No. 06-1094-cv, 2007 WL 1725512, at **4 (2d Cir. June 14, 2007).

In *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997), the Seventh Circuit also concluded that § 1415(*l*) provides a civil action to enforce the IDEA.

> [Section] 1415([*l*]) makes clear that Congress intended that a § 1983 remedy be available to the beneficiaries of the statute. . . . [Section] 1415([*l*]) was enacted in response to the

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[3] At the time of this decision what is now § 1415(*l*) was contained in § 1415(f). For simplicity we have substituted bracketed references to § 1415(*l*) in decisions that in fact reference the same provision when it was codified as § 1415(f).

> Supreme Court's decision in *Smith v. Robinson*. . . . *Smith* had held that. . . . [IDEA]'s extensive administrative scheme . . . foreclosed a § 1983 or similar action. Congress responded by enacting § 1415([*l*]) which allowed . . . § 1983 claims under the [IDEA]. . . .
>
> . . . [Section] 1415([*l*]) was enacted for the express purpose of ensuring that § 1983 claims would be available to enforce the [IDEA].

Id. at 621-22 (footnotes and citations omitted).

The Fifth Circuit has aligned itself with the Second and Seventh Circuits. In *Angela L. v. Pasadena Independent School District*, 918 F.2d 1188 (5th Cir. 1990), the court stated that by enacting the 1986 amendment to the IDEA Congress "rejected the Court's conclusion in *Smith* that the [IDEA] was an 'exclusive remedy.' 20 U.S.C. § 1415([*l*]). Consequently, parents may continue to allege violations of 42 U.S.C. § 1983 and section 504 of the Rehabilitation Act. These statutes permit parents to obtain relief which otherwise is unavailable from the [IDEA]." *Id.* at 1193 n.3. In light of *Angela L.*, the availability of § 1983 actions is "well settled" in the Fifth Circuit. *Pace v. Bogalusa City Sch. Bd.*, No. Civ.A. 99-806, 2001 WL 969103, at *2 (E.D. La. Aug. 23, 2001)

(citing *Angela L.*), *aff'd in part on other grounds*, 403 F.3d 272 (5th Cir. 2005) (en banc).[4]

Finally, in *Gean v. Hattaway*, 330 F.3d 758 (6th Cir. 2003), the Sixth Circuit held that a plaintiff may bring an action pursuant to § 1983 for damages based on underlying violations of the IDEA, and that when a plaintiff's claim for money damages seeks relief not available under the IDEA, the plaintiff need not exhaust administrative remedies provided for in the Act. *Id.* at 774 ("It is when a plaintiff has a legitimate claim for 'general damages' not available under the IDEA that we have been willing to allow her to by-pass the administrative process detailed in that statute. . . .").[5]

B. Six Other Circuits Hold That § 1983 Does Not Provide a Cause of Action to Enforce the IDEA.

The Third Circuit has expressly rejected the view of the Second, Fifth, Sixth, and Seventh Circuits that § 1415(*l*) assures the viability of a § 1983 claim. *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 802-03 (3d Cir.

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[4] *See also R.J. v. McKinney Ind. Sch. Dist.*, No. 4:05CV257, 2005 WL 3576839, at *3 (E.D. Tex. Dec. 29, 2005) (citing *Angela L.*); *Doe ex rel. Doe v. S & S Consol. I.S.D.*, 149 F. Supp. 2d 274, 303 (E.D. Tex. 2001) (citing *Angela L.*), *aff'd*, 309 F.3d 307 (5th Cir. 2002).

[5] Because the plaintiff in *Gean* was seeking restitution for past payments for educational services, the Sixth Circuit concluded that exhaustion of these claims was required. *Id.*

2007) (en banc). The Third Circuit disagreed in particular with the Seventh Circuit's reliance on the legislative history of § 1415(*l*).

> We . . . reject [the plaintiff's] contention that the references to § 1983 in the legislative history of § 1415(*l*) show that Congress intended to preserve the availability of § 1983 to remedy violations of IDEA-created rights. . . .
>
> . . . Given th[e] comprehensive scheme [in the IDEA], Congress did not intend § 1983 to be available to remedy violations of the IDEA. . . .

Id. at 803 (footnote and citations omitted). The Ninth Circuit in the instant case adopted a similar view, explaining that the court was "persuaded by" the Third Circuit decision in *A.W.*, and quoting the Third Circuit's reasoning that the "comprehensive scheme" in the IDEA precluded enforcement under § 1983. Pet. App. 7.

In *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28 (1st Cir. 2006), the First Circuit held that § 1983 could not be used to enforce the IDEA because that would permit a plaintiff in a § 1983 action to obtain remedies that were not provided by the IDEA itself. The Eighth Circuit relied on the same reasoning to reject § 1983 actions to enforce the IDEA. "[P]laintiffs' claims based upon defendants' alleged violations of the IDEA may not be pursued in this § 1983 action because general and punitive damages for the types of injuries alleged by plaintiffs are not available

under the IDEA." *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996).

In *Padilla ex rel. Padilla v. School District No. 1, Denver*, 233 F.3d 1268, 1273-74 (10th Cir. 2000), the Tenth Circuit reasoned that this Court's post-*Smith* decisions preclude use of § 1983 to enforce the IDEA. On two occasions since *Smith*, the court of appeals noted, the Court has continued to cite *Smith* in determining the availability of § 1983 to remedy violations of a statute. "Based on these cases, it appears the Supreme Court considers *Smith* to be alive and well insofar as it asserts that § 1983 may not be used to remedy IDEA violations." *Id.* at 1274.

In *Sellers ex rel. Sellers v. School Board of Manassas*, 141 F.3d 524, 529-31 (4th Cir. 1998), the Fourth Circuit rejected on a different ground reliance on § 1983 to enforce the IDEA. Section 1415(*l*), the Fourth Circuit reasoned, allows only § 1983 actions to enforce constitutional rights related to the education of disabled children, but does not permit § 1983 actions to enforce statutory rights, such as the rights created by the IDEA. "[S]ection 1415([*l*]) does permit plaintiffs to resort to section 1983 for *constitutional* violations, notwithstanding the similarity of such claims to those stated directly under IDEA. But section 1415([*l*]) does not permit plaintiffs to sue under section 1983 for an IDEA violation, which is

statutory in nature." *Id.* at 530 (emphasis in original).[6]

C. This Inter-Circuit Conflict Is Widely Recognized.

The Ninth Circuit's decision below candidly recognized the well-established inter-circuit conflict that exists about this recurring question of law.

> There is an existing circuit split on whether, with the amendment [adding section 1415(*l*)], Congress intended the IDEA rights to be enforceable under § 1983. The First, Third, Fourth, and Tenth Circuits have held that Congress did not so intend. The Second and Seventh Circuits have held that Congress did so intend. . . . *See A.W. v. Jersey City Pub. Sch.* . . . (surveying the existing circuit split . . .).

Pet. App. 6-7 (footnotes omitted).[7]

In *Padilla*, the Tenth Circuit acknowledged that the "[c]ircuits that have addressed the question [of whether § 1983 may be used to enforce the IDEA]

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[6] The Sellers urged the Fourth Circuit to adopt the contrary position. *See* Brief for Appellants, *Sellers*, 141 F.3d 524 (No. 97-1762), 1997 WL 33492433, at *17-21, 29-38.

[7] In its briefing before the Ninth Circuit, the District likewise acknowledged the split among the circuits on this issue. *See* Brief of Appelles [sic] at 13-14, 17, *Blanchard II*, __ F.3d __ (No. 06-35388) (discussing, inter alia, the Fourth Circuit's opinion in *Sellers* and the Second Circuit's opinion in *Mrs. W.*).

have not come to the same conclusion." 233 F.3d at 1272. In *A.W.*, the Third Circuit pointed out that "reasonable minds have differed as to the . . . interpretation of the congressional reaction to *Smith v. Robinson* embodied in § 1415(*l*)." 486 F.3d at 797; *id.* at 798 ("[T]he issue ha[s] created a circuit split."). The Third Circuit noted that decisions in the Second and Seventh Circuits "have concluded that Congress intended to allow recourse to § 1983 to remedy IDEA violations," *id.* at 799 n.12, while decisions in the Fourth and Tenth Circuits had reached the opposite conclusion, *id.* at 797-98.

Many district courts have likewise recognized that the circuits are split on this issue. Earlier this year, the court in *Carney ex rel. Carney v. Nevada ex rel. Department of Education*, No. 03:05-CV-00713-LRH-RAM, 2007 WL 777697 (D. Nev. Mar. 12, 2007), *clarified on other grounds by* 2007 WL 3256573 (D. Nev. Oct. 31, 2007), observed that "[t]here is a split of authority in the federal circuits as to whether redress for violations of IDEA may be pursued through a § 1983 claim." *Id.* at *2. The Connecticut District Court in *M.H. v. Bristol Board of Education*, 169 F. Supp. 2d 21 (D. Conn. 2001), similarly noted "[t]here is currently a split among the circuit courts regarding whether the IDEA provides the exclusive remedy for violations of its provisions, or whether § 1983 is available to assert a cause of action for damages." *Id.* at 28. Several other decisions have also recognized this well-established conflict. *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 114 (D.D.C. 2000)

("The circuits are split on the issue of whether section 1983 claims may be premised on IDEA violations."); *Goleta Union Elem. Sch. Dist. v. Ordway*, 166 F. Supp. 2d 1287, 1292 (C.D. Cal. 2001) (discussing the "split of opinion among the Courts of Appeals regarding the relationship between section 1983 and the IDEA"), *overruled on other grounds by Blanchard II*, __ F.3d __; *Andrew S. ex rel. Margaret S. v. Sch. Comm. of Greenfield*, 59 F. Supp. 2d 237, 242 (D. Mass. 1999) (noting "a split of opinion among the Courts of Appeals regarding the relationship between section 1983 and the IDEA").

II. THE QUESTION PRESENTED INVOLVES A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE.

The decision below creates a system of economic incentives that undermines both the interest of disabled children and their parents in obtaining an effective education and the due administration of justice.

For the parents of a disabled child, the Ninth Circuit decision results in a powerful incentive to hire an attorney to handle disputes with local school officials rather than attempting to resolve education issues without the assistance or involvement of counsel. The IDEA provides that parents who retain counsel to pursue IDEA rights, and who ultimately prevail on the merits of those claims, are entitled to an award of counsel fees. 20 U.S.C. § 1415(i)(3)(B)(i)(I).

Thus, in the instant case, if Ms. Blanchard had retained an attorney to handle the protracted struggle required to obtain an appropriate education for her son, she would have been entitled to an award of counsel fees that could easily have totaled hundreds of thousands of dollars.

Ms. Blanchard took the far less costly course of pursuing the proceedings pro se. Although doing so forced her to forego $25,000 in self-employment income, that was only a fraction of the cost that would have been incurred—and for which the school board would have been liable—if Ms. Blanchard had instead retained an attorney. The Ninth Circuit decision, by holding that the parent of a disabled child can never obtain redress for costs incidental to self-representation, strongly encourages parents able to do so to opt for the more expensive alternative of retaining counsel to pursue IDEA claims that the parents themselves might have been able to obtain on their own. Whether the resulting additional cost is ultimately borne by the school district (because the parents prevail) or by the parents (because they do not), that incentive is highly undesirable.

Many parents, however, will not be able to afford to hire attorneys to enforce their IDEA rights, even though under the Ninth Circuit decision that is the only way the parents could obtain recompense for the expense involved in winning an effective education for their children. Most families are not in a position to pay (or incur liability for) the tens of thousands of dollars in legal fees that would be involved in even a

modest administrative proceeding. *See Frank G. v. Bd. of Educ. of Hyde Park*, 459 F.3d 356, 362 (2d Cir. 2006) (awarding counsel fee of $34,567), *cert. denied*, 128 S. Ct. 436 (2007); Adam Liptak, *Nonlawyer Father Wins His Suit Over Education, and the Bar Is Upset*, N.Y. Times, May 6, 2006, at A8 (stating that family could not afford to hire a lawyer to represent them in their IDEA case and that one lawyer quoted them $60,000 to handle the case). The potential legal bills will at times be greater than the cost of simply giving up on the public schools and paying tuition at a private school willing—for a fee—to provide an effective education to the disabled child.

If a child's parents, after unsuccessful efforts to obtain a free appropriate public education, are forced (and have the financial ability) to put the child in a private school, a subsequent successful challenge to the school board's practices will entitle the parents to reimbursement for those private school expenses. *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). But many families do not have the financial ability to pay for such private education in the hope that, at some point in the future, an administrative or judicial determination will entitle them to reimbursement. *Id.* at 370 (option of educating disabled children in private schools is available only to "conscientious parents who have adequate means"). Parents of children with disabilities are substantially more likely than others to have

income below the poverty level.[8] Thus, for many families with disabled children, the only financially realistic option is to keep their children in public schools and attempt—without the assistance of counsel, and without hope of an award of counsel fees or tuition reimbursement—to pursue their rights through pleas to school officials and resort to the administrative process.

In dealing with such families under the Ninth Circuit decision, school officials have an obvious financial interest in refusing to comply with the IDEA, postponing as long as possible—indefinitely, perhaps—providing the free appropriate public education guaranteed by federal law. Providing such an effective education to a disabled child can be expensive, in some cases substantially so.[9] If an effective education requires

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[8] Children with disabilities are disproportionately raised by households in poverty. "At 24%, the rate of poverty among the households of students with disabilities is higher than the 16% found in the general population. Despite the fact that parents are about equally likely to be employed, households of students with disabilities are much more likely to have low and very low incomes." *See* Mary Wagner & Jose Blackorby, *Overview of Findings from Wave 1 of the Special Education Elementary Longitudinal Study* (SEELS) (June 2004) at 5, *available at* http://www.seels.net/designdocs/seels_wave1_9-23-04.pdf.

[9] For this reason, the IDEA provides "billions of dollars to States" to defray these costs. Brief for the United States as Intervenor at 4, *A.W.*, 486 F.3d 791 (02-2056) ("The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. 1400 *et seq.*, is a federal grant program that provides billions of dollars to States to educate children with disabilities.").

placing a disabled child in a private school, a school district that ultimately agrees (or is forced) to do so will be required to pay tuition bills that can easily total in the tens of thousands of dollars. Each year that the school board refuses to provide the appropriate education mandated by the IDEA represents a substantial financial savings to the school district, either in internal costs or in payments for outside tuition.

In the Second, Fifth, Sixth, and Seventh Circuits, school officials have a substantial financial incentive to comply with the IDEA. If the parents of the disabled child ultimately prevail in those circuits, they may be entitled in a § 1983 action to a damage award that exceeds the money the school district initially saved by failing to provide the child with an effective education. But in the Ninth Circuit, a school board's intransigence shifts those costs to the families of the disabled children, in the form of damage to the children or their parents or the expenses (including related losses in income) of pursuing their claims pro se.

The Ninth Circuit's decision results in a dual system for children with disabilities. If their parents are well off—and can afford to hire an attorney and pay for private schooling until a dispute is resolved—the children will suffer no educational harms, and their parents may be fully reimbursed for every dollar spent in connection with the dispute. The prospect of ultimately having to pay for those attorneys' fees and tuition bills provides a school district with a persuasive economic reason to respect the rights of children of affluent parents. But if a child has parents

of modest means, injuries the child suffers during the duration of the dispute, and any injuries and financial costs and losses to the family, will never be redressed. For as long as it postpones complying with the IDEA, the decision below spares a school district the cost of providing an appropriate public education, and transfers that burden, in the form of uncompensated damages, to the less affluent families of children with disabilities.

The circumstances of *Board of Education of the City School District of New York v. Tom F. ex rel. Gilbert F.*, 128 S. Ct. 1 (2007) (per curiam), illustrate this dual system. The father in that case, the former chief executive of Viacom, had unlimited assets with which to pursue his IDEA claim and thereby ensure that his child received the education mandated by the IDEA.[10] He had the resources needed both to place his child in private school, despite an annual tuition of over $21,000, and to hire a lawyer to represent himself and his son throughout a decade-long battle with the school district, including due process hearings and a subsequent court action.[11] For the fortunate few, the Ninth Circuit decision leaves in place a highly efficacious remedial scheme. But if the Ninth

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[10] *See* David Stout & Jennifer Medina, *With Justices Split, City Must Pay Disabled Student's Tuition*, N.Y. Times, Oct. 11, 2007, at B1.

[11] Brief for Petitioner at 6-18, *Tom F.*, 128 S. Ct. 1 (No. 06-637). Mr. F. even brought a representative from his attorney's office to the Committee on Special Education meeting called to design Gilbert F.'s IEP. *Id.* at 7.

Circuit's opinion is permitted to stand, then for ordinary parents, like Ms. Blanchard, hard-fought struggles to obtain an appropriate education for their children may lead to no more than pyrrhic victories.

CONCLUSION

For each of these reasons, this Court should grant a writ of certiorari to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERYL BLANCHARD,

Plaintiff-Appellant,

v.

MORTON SCHOOL DISTRICT; RUSS DAVIS, Superintendent; REGINE ALEKSUNAS, SE Teacher; JIM GROSSMAN, SLP; ROBYN GOODWIN, Principal,

Defendants-Appellees.

No. 06-35388

D.C. No. CV-02-05101-FDB

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
July 31, 2007 – Portland, Oregon

Filed September 20, 2007
Amended December 3, 2007

Before: Alfred T. Goodwin, Mary M. Schroeder, and Susan P. Graber, Circuit Judges.

Opinion by Judge Schroeder

COUNSEL

Lonnie Davis, Disabilities Law Project, Seattle, Washington, for the plaintiff-appellant.

Jocelyn J. Lyman, Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S., Olympia, Washington, for the defendants-appellees.

ORDER

The Opinion filed on September 20, 2007, is amended as follows: on slip Opinion page 12821, remove lines 21 through 34, and insert the following text:

> Blanchard also brings claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and title II of the ADA, 42 U.S.C. § 12132. Under those statutes, Blanchard is a proper plaintiff, at least insofar as she is asserting and enforcing the rights of her son and incurring expenses for his benefit. *See Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1115 (9th Cir. 1987); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 46-47 (2d Cir. 1997) (holding that a hospital had standing to sue under the Rehabilitation Act and the ADA), *superseded on other grounds, as recognized in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). As the Supreme Court has noted, "a parent of a child with a disability has a particular and personal interest" in preventing discrimination against the child. *Winkelman*, 127 S. Ct. at 2003.
>
> Blanchard is not entitled to the damages that she seeks, however. We need not decide

whether damages are available for a parent's own emotional distress resulting from the enforcement of a child's educational rights, because Blanchard abandoned that claim by failing to raise it in her brief on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Her claim for lost profits essentially seeks compensation for acting as her own lawyer. Pro se plaintiffs, though, are not entitled to attorney's fees. *See Kay v. Ehrler*, 499 U.S. 432, 438 (1991). Because Blanchard cannot recover damages, the district court properly dismissed her Rehabilitation Act and ADA claims.

No future petitions for rehearing or petitions for rehearing en banc will be entertained.

OPINION

SCHROEDER, Circuit Judge:

Plaintiff-Appellant Cheryl Blanchard seeks damages to compensate her for lost income and the emotional distress she experienced during her ultimately successful efforts to obtain benefits for her son under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. When this matter was before us previously, we reversed the district court's dismissal for failure to exhaust administrative remedies. *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918 (9th Cir. 2005) ("*Blanchard I*"). We held that, because Blanchard sought damages on her own behalf rather than her son's, no administrative remedies

existed. *Id.* at 921-22. We expressed no opinion on the merits of her claim. *Id.* at 922.

On remand, the district court granted summary judgment for Defendants, holding that Blanchard had no individual rights under the IDEA and that the IDEA's enforcement scheme did not contemplate the damages she seeks. It further held that, because Blanchard is not a qualified individual with a disability, her claim is not cognizable under either title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12132, or section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). *See* 42 U.S.C. § 12132; 29 U.S.C. § 705(20).

After the district court's entry of summary judgment, however, the United States Supreme Court held that parents do have individually enforceable substantive rights under the IDEA. *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994, 1999 (2007). The Court said that those rights were sufficient to permit a parent to appear pro se in pursuit of IDEA remedies to secure for a child the free appropriate public education guaranteed under § 1415 of the IDEA. *Id.* at 2005.

We have held that money damages are not available under the IDEA for the pain and suffering of a disabled child. *Witte ex rel. Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999). The question before us now is whether 42 U.S.C. § 1983 creates a cause of action for money damages under the IDEA for the lost earnings and suffering of a parent

pursuing IDEA relief. We hold that it does not. We affirm the district court's judgment in favor of the school district after taking into account the intervening Supreme Court decision in *Winkelman*.

Section 1983 does not in itself create any right under federal law. It provides remedies for violations of federal rights only where a "federal statute creates an individually enforceable right in the class of beneficiaries to which [plaintiff] belongs." *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005).

In *Winkelman*, 127 S. Ct. at 1999, the Supreme Court provided a thorough analysis of the IDEA's "interlocking statutory" enforcement scheme. The Court catalogued the IDEA's numerous provisions creating substantive rights, and it concluded that the statute confers those rights on the parents of disabled children as well as on the children themselves. *Id.* at 2000-05. Notably, all the rights created by the statute, including the rights to reimbursement of expenses and to recovery of attorney's fees, relate to necessary efforts to secure a child's free appropriate public education. *See* 20 U.S.C. § 1400(d)(1)(A)-(B) (stating that the IDEA's substantive and procedural protections exist in order to "ensure that all children with disabilities have available to them a free appropriate public education" and to protect the rights of the parents of such children in the process of ensuring the children's access to education); 20 U.S.C. § 1415(b)(6) (providing a judicial remedy for

violations of any right "relating to the identification, evaluation, or educational placement of [a] child").

In *Smith v. Robinson*, 468 U.S. 992, 1013 (1984), the Supreme Court held that the Education of the Handicapped Act ("EHA"), the predecessor to the IDEA, was the exclusive means of remedying violations of the rights it guaranteed. In response, Congress amended the statute to include what now is 20 U.S.C. § 1415(1).[1] Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, § 3, 100 Stat. 796, 797. There is an existing circuit split on whether, with the amendment, Congress intended the IDEA rights to be enforceable under § 1983.[2] The First, Third, Fourth, and Tenth Circuits have held that Congress did not so intend.[3] The Second and Seventh

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[1] "Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities. . . ." 20 U.S.C. § 1415(1) (citations omitted).

[2] In *Department of Education v. Katherine D.*, 727 F.2d 809, 820 (9th Cir. 1984), we held that the EHA's "comprehensive and exclusive remedial scheme . . . precludes reliance upon a cause of action under section 1983." However, we decided *Katherine D.* before Congress amended the IDEA. Consequently, although our holding today is consistent with it, *Katherine D.* cannot answer the question of what Congress intended when it amended the IDEA.

[3] *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 28 (1st Cir. 2006); *A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 803 (3d Cir. 2007) (en banc); *Sellers v. Sch. Bd.*, 141 F.3d 524, 529 (4th Cir.

(Continued on following page)

Circuits have held that Congress did so intend.[4] The Eighth Circuit has holdings going both ways.[5] We are persuaded by the recent thoughtful, well-reasoned opinion of the Third Circuit. *See A.W. v. Jersey City Pub. Sch.*, 486 F.3d 791, 797-803 (3d Cir. 2007) (en banc) (surveying the existing circuit split and analyzing recent Supreme Court precedent on the availability of § 1983 as a remedy for violation of a federal statute).[6] In *A.W.*, the Third Circuit overruled its prior authority to the contrary and held:

> The IDEA includes a judicial remedy for violations of any right "relating to the identification, evaluation, or educational placement of [a] child, or the provision of a free appropriate public education to such child." § 1415(b)(6). Given this comprehensive scheme, Congress

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1998); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1273 (10th Cir. 2000).

[4] *Mrs. W. v. Tirozzi*, 832 F.2d 748, 755 (2d Cir. 1987); *Marie O. v. Edgar*, 131 F.3d 610, 622 (7th Cir. 1997).

[5] *Compare Digre v. Roseville Sch. Indep. Dist. No. 623*, 841 F.2d 245, 250 (8th Cir. 1988) ("Mrs. Digre was entitled to bring a section 1983 action based on alleged violations of the [predecessor to the IDEA]. . . ."), *with Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996) ("We now hold as a matter of law that plaintiffs in the present case cannot recover general or punitive damages [under § 1983] arising out of defendants' alleged violations of the IDEA. . . ."; failing even to mention or cite *Digre*).

[6] We note that the holdings of the Second and Seventh Circuits predate recent Supreme Court precedent on the availability of § 1983 actions, and the Second Circuit's opinion does not discuss congressional intent at all.

> did not intend § 1983 to be available to remedy violations of the IDEA. . . .

Id. at 803 (alteration in original). We now join the First, Third, Fourth, and Tenth Circuits and hold that the comprehensive enforcement scheme of the IDEA evidences Congress' intent to preclude a § 1983 claim for the violation of rights under the IDEA.

Therefore, in light of *Winkelman,* the district court was not correct in ruling that the IDEA creates no individual rights in parents. However, insofar as the district court held that IDEA does not contemplate the remedy Blanchard seeks and in that regard creates no right enforceable under § 1983, the district court must be affirmed.

Blanchard also brings claims under section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and title II of the ADA, 42 U.S.C. § 12132. Under those statutes, Blanchard is a proper plaintiff, at least insofar as she is asserting and enforcing the rights of her son and incurring expenses for his benefit. *See Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1115 (9th Cir. 1987); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 46-47 (2d Cir. 1997) (holding that a hospital had standing to sue under the Rehabilitation act and the ADA), *superseded on other grounds, as recognized in Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). As the Supreme Court has noted, "a parent of a child with a disability has a particular and personal interest" in preventing

discrimination against the child. *Winkelman*, 127 S. Ct. at 2003.

Blanchard is not entitled to the damages that she seeks, however. We need not decide whether damages are available for a parent's own emotional distress resulting from the enforcement of a child's educational rights, because Blanchard abandoned that claim by failing to raise it in her brief on appeal. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Her claim for lost profits essentially seeks compensation for acting as her own lawyer. Pro se plaintiffs, though, are not entitled to attorney's fees. *See Kay v. Ehrler*, 499 U.S. 432, 438 (1991). Because Blanchard cannot recover damages, the district court properly dismissed her Rehabilitation Act and ADA claims.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHERYL BLANCHARD, Plaintiff, v. MORTON SCHOOL DISTRICT, et al., Defendant.	Case No. CV 02-5101 FDB ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSAL (Filed April 20, 2006)

Before the court is the motion of Defendants (collectively referred to as the "District") for summary judgment dismissal of all claims of Plaintiff Cheryl Blanchard. The court, having considered the motion, response, and affidavits of the parties, finds that Ms. Blanchard's claims are not cognizable under applicable law and must, therefore, be dismissed.

I. Procedural Background

Ms. Blanchard filed this case in May, 2002. On July 18, 2003, the court granted the District's motion to dismiss, dismissing the case on the basis that Ms. Blanchard had failed to exhaust her administrative remedies under the Individuals with Disabilities Education Act (IDEA). On August 19, 2005, the Ninth Circuit Court of Appeals reversed and remanded the case, holding that the complaint could not be dismissed for failure to exhaust administrative remedies as the IDEA provides no remedy for Ms. Blanchard.

The Ninth Circuit's holding was limited to the exhaustion issue. *Blanchard v. Morton School District, et al.*, 420 F.3d 918, 922 (9th Cir. 2005). The Ninth Circuit was not called upon to decide whether any of Ms. Blanchard's claims for damages is substantively cognizable under federal law or whether her claims are meritorious.

Ms. Blanchard alleges that she is entitled to damages for lost profits from her floral manufacturing business from 1999 to 2001 for time spent "dealing with hearings and learning the law." She also seeks damages for emotional distress.

II. Factual Background

Ms. Blanchard is the mother of Daniel, a student who receives special education at the Morton School District, a small district located in Lewis County, Washington. In 2000, Ms. Blanchard pursued her first due process hearing concerning services provided to her son during the 1999/2000 school year. The ALJ determined that the District had not implemented the Individualized Education Program (IEP) for Daniel during the 1999/2000 school year and had not adequately trained staff to implement the IEP. The District was ordered to implement the IEP, obtain more training for staff and provide 100 hours of compensatory education for Daniel.

In 2001, Ms. Blanchard pursued a second hearing based on her concern that the length of the Extended School Year (ESY) services the District offered to

provide Daniel for the summer of 2001 was insufficient. The ALJ ruled that the District's proposal concerning ESY services complied with the requirements of the IDEA.

In June 2001, Ms. Blanchard pursued a third due process hearing, claiming that the District had failed to timely identify ESY services for Daniel following the 1999/2000 school years, that he had not been allowed to go on field trips during the 1999/2000 school year, that the District had not properly implemented the order entered after the first due process hearing, and that Daniel's IEP was not followed during the 2000/2001. Several issues were dismissed by the ALJ at a summary judgment proceeding and Ms. Blanchard thereafter requested that the hearing be cancelled, resulting in an order of dismissal.

In 2003, Ms. Blanchard pursued a fourth hearing but, the matter was settled prior to a hearing.

III. Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corporation v. Catrett,* 477 U.S. 317, 106 S.Ct. 2648 (1986). Failure of proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can exist

and summary judgment is mandated. *Id.*, 106 S.Ct. at 2552.

This issues [sic] on the instant motion are legal, rather than factual. The District argues that Ms. Blanchard's claims fail because they are not cognizable under applicable law. Ms. Blanchard provides additional facts relating to the previous administrative hearings that are not material to the legal issue of whether her damage claims are legally cognizable under the IDEA, ADA, Rehabilitation Act or § 1983.

IV. Discussion

A. Claim for Damages Under the IDEA

Ms. Blanchard claims that she is entitled to damages under the IDEA for emotional distress and loss of profits for time she spent dealing with hearings and learning the law, during 1999/2001 when she was participating in the due process hearings on her son's behalf.

Monetary damages for retrospective and non-educational injuries are not available under the IDEA. *Blanchard,* 420 F.3d at 921. As noted by the Ninth Circuit, "[t]he remedies available under the IDEA include educational services for disabled children. *See* 20 U.S.C. §§ 1400-1482. They do not provide an adequate remedy for Blanchard." Ms. Blanchard had no administrative remedies under the IDEA to exhaust because she had resolved the educational issues implicated by her son's disability and had

obtained the educational relief available under the IDEA on behalf of her son. *Id.* The Court stated further that Ms. Blanchard's claims for "emotional distress injuries and lost income could not be remedied through the educational remedies available under the IDEA. *Id. citing Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1275 (9th Cir. 1999).

Ms. Blanchard argues that she is seeking reimbursement rather than monetary damages. Ms. Blanchard's reliance on *Bucks County Dept. of Mental Health/Mental Retardation v. Commonwealth of Pennsylvania, Dept. of Public Welfare,* 379 F.3d 61 (3rd Cir. 2004), however, is misplaced. In that case, expenses were incurred by the mother of a handicapped child in order to provide the specific therapy program the defendant refused to provide. *Id.* at 61-62. There, the parent stepped in to learn and perform the duties of a trained service provider that the defendant was legally obligated to provide.[1]

Expenses are reimbursable so long as they were reasonably and foreseeably expended to secure for a

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[1] Ms. Blanchard's claim of damages for spending time at hearings and learning the law is similar to the claims of attorney parents seeking reimbursement for representing their children in due process hearings and petitions for review. Claims for reimbursement by parents, including attorney parents, for representing their disabled children in administrative hearings under the IDEA, have been rejected in other federal courts. *Woodside v. School District of Philadelphia Board of Education,* 248 F.3d 129, 131 (3rd Cir. Pa. 2001); *Doe v. Board of Education of Baltimore County,* 165 F.3d 260, 263 (4th Cir. 1998).

handicapped child, those services that defendants were legally obligated to provide. *See, e.g., Greater Los Angeles Council on Deafness, Inc. v. Zolin,* 812 F.2d 1103 (9th Cir. 1987). The court concludes that a suit for lost profits and for personal pain and suffering under the IDEA is not allowed.

B. Section 1983 Claim

To sustain a § 1983 action, the plaintiff must demonstrate that the federal statute upon which she relies creates an individually enforceable right in the class of beneficiaries to which she belongs. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). Even after this showing, "there is only a rebuttable presumption that the right is enforceable under § 1983." *Blessing v. Freestone,* 520 U.S. 329, 341, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997). The defendant may defeat this presumption by demonstrating that Congress did not intend that remedy for a newly created right. *Id.* (*citing Smith v. Robinson,* 468 U.S. 992, 1012, 104 S.Ct. 3457, 82 L.Ed.2d 746 (1984)). "Evidence of congressional intent may be found directly in the statute creating the right, or inferred from the statute's creation of a 'comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983'". *Id.* (internal citations omitted).

The IDEA was enacted to ensure that children with disabilities have available to them a FAPE that emphasizes special education and related services

designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A); *Blanchard,* 420 F.3d at 920. While parents have procedural rights to participate with the team of educational professionals in the development of an IEP for their child and the opportunity to challenge decisions of the IEP team, they are not the real parties in interest. *See, e.g., Collinsgru v. Palmyra Board of Education,* 161 F.3d 225, 236 (3rd Cir. 1998).

Ms. Blanchard's participation in the educational process is dependent upon being the parent of a child receiving services covered by the IDEA. She has no individually enforceable right under the IDEA to support a claim for damages under § 1983.[2]

C. ADA and Rehabilitation Act Claims

Ms. Blanchard alleges violation of Section 504 of the Rehabilitation Act, 20 U.S.C. § 794(a) and the Americans with Disabilities Act, 42 U.S.C. § 12132 (Title II of the ADA). To prove a public service or program violates the ADA, a plaintiff must show that she is a "qualified individual" with a disability, excluded from participation or denied benefits by reason

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[2] The comprehensive enforcement scheme provided by the IDEA is also incompatible with enforcement through § 1983. *See, Smith v. Robinson,* 468 U.S. 992, 104 S.Ct. 3457 (1984); *Department of Education, State of Hawaii v. Katherine D.,* 727 F.2d 809 (9th Cir. 1983) (*cited with approval in Abrams v. City of Rancho Palos Verdes,* 354 F.3d 1094 (9th Cir. 2004) (*rev'd on other grounds in* 125 S.Ct. 1453.

of her disability. The same requirements must be met under Section 504.

Ms. Blanchard does not allege that she is a "qualified person with a disability" and there is no reason to believe that she can meet this definition. Additionally, Ms. Blanchard's claim of "reimbursement" is not for the type of expense she is legally allowed to pursue under the ADA and Rehabilitation Act. Ms. Blanchard's reliance on *Patricia N. v. Lemahieu,* 141 F.Supp.2d 1253 (D. Hawaii 2001) is unavailing. As noted above, the expenses claimed must have been reasonably and foreseeably expended to secure services that the defendant was legally obligated to provide but failed to provide.

D. Individual Liability

(1) Dismissal of Individuals for Failure of Service

On February 14, 2003, the court entered an order indicating that it would grant defendants' then outstanding motion to dismiss for insufficiency of process if the defendants were not served by March 14, 2003. Returns of service for Defendants Russ Davis and Robyn Goodwin were never filed. Accordingly, all claims against them are dismissed.

(2) Dismissal of Remaining Individual Defendants

Ms. Blanchard named two additional individual defendants in her complaint, former teacher Regine Alexsunas, and Jim Grossman, a speech and language specialist not employed the District. The District argues that these defendants may not be held individually liable under the ADA, Rehabilitation Act, IDEA, or § 1983, when these statutes are used as a basis for the § 1983 claim. The court agrees. Neither the ADA or Rehabilitation Act provide for liability against defendants sued in their individual capacity. *Miller v. King,* 384 F.3d 1248, 1277 (11th Cir. 2004); *Baublitz v. State of California,* 1998 WL 4274444 at 1 (N.D. Cal. 1998)). In addition, there is no individual liability for damages under the ADA and Rehabilitation Act when these statutes are used as the basis for a § 1983 claim. *Vinson v. Thomas,* 288 F.3d 1145, 1156 (9th Cir. 2002).

Finally, as money damages are not available for retrospective and non-educational injuries under the IDEA, *Blanchard,* 420 F.3d at 921, these same damages cannot be recovered from the individually named defendants as a matter of law.

V. Conclusion

For the reasons stated above, the court concludes that Ms. Blanchard's claims are not cognizable as a matter of law and must be dismissed.

ACCORDINGLY,

IT IS ORDERED:

(1) Defendants' motion for summary judgment (Dkt.#50) is **GRANTED** and Plaintiff's Complaint is dismissed with prejudice.

DATED this 20th day of April, 2006.

/s/ Franklin D. Burgess
FRANKLIN D. BURGESS
UNITED STATES
DISTRICT JUDGE

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERYL BLANCHARD,

Plaintiff-Appellant,

v.

MORTON SCHOOL DISTRICT; RUSS DAVIS; REGINE ALEKSUNAS, SE Teacher; JIM GROSSMAN, SLP; ROBYN GOODWIN, Principal,

Defendants-Appellees.

No. 03-35677

D.C. No. CV-02-05101-FDB

OPINION

Appeal from the United States District Court for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted
January 14, 2005 – Seattle, Washington

Filed August 19, 2005

Before: Mary M. Schroeder, Chief Judge, Alfred T. Goodwin and Susan P. Graber, Circuit Judges.

Opinion by Chief Judge Schroeder

COUNSEL

Lonnie Davis, Disabilities Law Project, Seattle, Washington, for the plaintiff-appellant.

Jocelyn J. Lyman, Law, Lyman, Daniel, Kamerrer & Bogdanovich, P.S., Olympia, Washington, for the defendants-appellees.

OPINION

SCHROEDER, Circuit Judge:

This is an action by the mother of a child with autism, who seeks damages for the mother's own emotional distress caused by the conduct of the defendants, the Morton School District and its current and former employees, in providing special education services to her son. The district court dismissed the action for failure to exhaust administrative remedies under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482. We reverse, because there were no administrative remedies available for her to exhaust. We remand to the district court to consider the merits of her claims.

Plaintiff Cheryl Blanchard's son is enrolled in a special education program provided by the Morton School District ("District"). Blanchard, pro se, represented her son in a series of administrative actions against the District, alleging that the District failed to accommodate him under the IDEA. In 2000, an administrative law judge concluded that the District had not properly implemented the student's individualized education plan and had denied the student a free appropriate public education as mandated by section 1415 of the IDEA. The administrative law judge ordered the District to implement the plan, and

provide compensatory education to the student for the District's past failings. The record indicates that Blanchard felt compelled to initiate four other hearings on behalf of her son between 2001 and 2003, aimed at implementing and modifying the plan.

In 2002, Blanchard filed this complaint pro se against the District and several of its current and former employees. Blanchard sought money damages pursuant to 42 U.S.C. § 1983 for alleged emotional distress caused by the conduct of the defendants in providing special education services to her son under the IDEA. Blanchard sought damages for her emotional distress due to the defendants' alleged "deliberate indifference and violation of rights," as well as reimbursement for the income she lost while pursuing her son's remedies under the IDEA.

The defendants moved to dismiss her claim pursuant to Federal Rule of Civil Procedure 12(b)(1). The district court appointed pro bono counsel for Blanchard. The district court later granted the defendants' motion to dismiss, concluding that Blanchard failed to exhaust her administrative remedies under the IDEA. Blanchard appeals through her pro bono counsel.

DISCUSSION

The IDEA was enacted "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related service designed to meet their

unique needs." 20 U.S.C. § 1400(d)(1)(A). The IDEA sets out a comprehensive educational scheme that confers on disabled students a substantive right to public education. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992). Under the IDEA, state or local educational agencies can receive federal funding to assist them in educating disabled children. To receive the funding, state and local educational agencies must ensure that children with disabilities – and their parents – are guaranteed specified procedural safeguards with regard to the provision of free appropriate public education by the agencies. 20 U.S.C. § 1415(a).

The IDEA does not restrict or limit the rights of disabled students or their parents under other statutes. The IDEA requires, however, that "before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) [due process hearing] and (g) [appeal] of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter." 20 U.S.C. § 1415(1). If a plaintiff is required to exhaust administrative remedies but fails to do so, the federal courts do not have jurisdiction to hear the plaintiff's claim. *Witte v. Clark County Sch. Dist.*, 197 F.3d 1271, 1274 (9th Cir. 1999). (The policy behind the exhaustion requirement is to ensure that educational agencies have the first opportunities to remedy shortcomings in their educational programs for disabled students. *See Hoeft*, 967 F.2d at 1303; *see also Christopher S. v.*

Stanislaus County Office of Educ., 384 F.3d 1205, 1209 (9th Cir. 2004). Relief under the IDEA therefore must be appropriate in light of the primary purpose of the IDEA. *Sch. Comm. of Burlington v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369 (1985). Relief is available under the IDEA when "[b]oth the genesis and the manifestations of the problem are educational." *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 993 (7th Cir. 1996); *see also Robb v. Bethel Sch. Dist. #403*, 308 F.3d 1047, 1052 (9th Cir. 2002). At the same time, courts have recognized that the IDEA's administrative remedies cannot compensate for a plaintiff's injuries that are completely non-educational. *Padilla v. Sch. Dist. No. 1 of Denver*, 233 F.3d 1268, 1274 (10th Cir. 2000).

Thus, under the relevant statute, exhaustion of administrative remedies is required when a plaintiff is seeking "relief that is also available under" the IDEA. 20 U.S.C. § 1415(1). Blanchard argues that the district court erred in concluding that she failed to exhaust required administrative remedies before filing this suit. Blanchard did not pursue administrative remedies on her own behalf before filing suit. The issue in this appeal therefore is whether Blanchard was seeking "relief that is also available under" the IDEA, so that exhaustion was required.

For purposes of exhaustion, "relief that is also available under" the IDEA does not necessarily mean relief that fully satisfies the aggrieved party. Rather, it means "relief suitable to remedy the wrong done the plaintiff, which may not always be relief in the

precise form the plaintiff prefers." *Robb,* 308 F.3d at 1049. But there must be some relief available.

Blanchard's complaint sought money damages for emotional distress and for lost wages caused by the District's alleged deliberate indifference toward her son's IDEA claims and the District's alleged violations of the IDEA. Money damages for retrospective and non-educational injuries are not available under the IDEA. *See Witte,* 197 F.3d at 1275; *see also Polera v. Bd. of Educ. of the Newburgh Enlarged City Sch. Dist.,* 288 F.3d 478, 486 (2d Cir. 2002); *Charlie F.,* 98 F.3d at 991; *Hall v. Knott County Bd. of Educ.,* 941 F.2d 402, 407 (6th Cir. 1991). That alone is not dispositive, for a plaintiff cannot avoid the IDEA's exhaustion requirement simply by limiting a prayer for relief to money or services that are not provided under the IDEA. *Robb,* 308 F.3d at 1049. The dispositive question therefore is whether Blanchard is seeking remedy for injuries that could be redressed to any degree by the IDEA's administrative procedures. *Id.* at 1050.

The remedies available under the IDEA include educational services for disabled children. *See* 20 U.S.C. §§ 1400-1482. They do not provide an adequate remedy for Blanchard.

We held in *Witte* that a plaintiff seeking monetary relief for alleged past physical and emotional abuse by school staff was not required to exhaust administrative remedies under the IDEA. 197 F.3d at 1276. We emphasized that "all educational issues already have been resolved to the parties' mutual

satisfaction through the [administrative] process." *Id.* at 1275. That is true here, as well. Following *Witte,* we hold that Blanchard had no remedies under the IDEA to exhaust. Blanchard has resolved the educational issues implicated by her son's disability and has obtained the educational relief available under the IDEA on behalf of her son.

The District relies on *Robb.* In that case, a student with cerebral palsy and her parents sought damages for lost educational opportunities, emotional distress, humiliation, embarrassment, and psychological injury after the student was removed from the classroom for extended tutoring. *Robb,* 308 F.3d at 1048. We held that because these injuries could be remedied to some degree by the IDEA's administrative procedures and remedies, the plaintiffs must exhaust those administrative remedies before filing suit. *Id.* at 1054. We stated: "Where, as here, a plaintiff's injuries are part and parcel of the educational process, we must give the local administrators the first opportunity to remedy them." *Id.* at 1053 n.4. In this case, however, Blanchard's emotional distress injuries and lost income could not be remedied through the educational remedies available under the IDEA. *See Witte,* 197 F.3d at 1275.

The District also stresses that the IDEA requires school districts to provide "related services" to education, including "psychological services, . . . social work services, [and] counseling services, . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C. § 1401(26)(A). *See*

Robb, 308 F.3d at 1050. The regulations implementing the statute provide that the required psychological services may include "[p]lanning and managing a program of psychological services, including psychological counseling for children and parents." 34 C.F.R. § 300.24(b)(9)(v). The act thus has some provision for counseling parents, but only with respect to assisting the child. *See* 20 U.S.C. § 1401(26)(A). The psychological services available under the IDEA would not provide a remedy for Blanchard's own claims of emotional injury.

We emphasize that our holding is a narrow one: that there is no procedural barrier to Blanchard's claim that the defendants' acts (as distinct from her child's disability) have caused her to incur damages for emotional distress. In the present posture of the case we are not called on to decide whether Blanchard's claim is, substantively, cognizable under federal law nor, even if so, whether her claim is meritorious. We hold only that, because the IDEA provides no remedy for Blanchard, she need not exhaust administrative remedies before filing suit. We therefore reverse the district court's dismissal of Blanchard's complaint and remand the case for further proceedings.

REVERSED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CHERYL BLANCHARD, Plaintiff, v. MORTON SCHOOL DISTRICT, RUSS DAVIS, Superintendant, REGINE ALEKSUNAS, SE Teacher, JIM GROSSMAN, SLP, ROBYN GOODWIN, Principal, Defendants.	Case No. CO2-5101 FDB ORDER GRANTING DEFENDANTS' MOTION TO DISMISS (Filed Aug. 13, 2003)

Plaintiff filed this case in an attempt to recover monetary compensation pursuant to 42 U.S.C. § 1983 for alleged emotional distress resulting from conduct by the defendants in providing special education services to her son. As a basis of her § 1983 action, she claims that she has been denied rights secured by the Individuals with Disabilities Act (IDEA), 20 U.S.C. § 1415. Defendants move to dismiss the claims of plaintiff pursuant to Rule 12(b)(1) of the Rules of Civil Procedure. The Court has carefully reviewed all documents filed in this matter and finds that defendants' Motion to Dismiss should be **GRANTED**.

The record reflects that plaintiff represented her son *pro se* in *In the Matter of Morton School District,* Special Education Cause No. 00-37. The

Administrative Law Judge reviewing the matter concluded that the Morton School District had denied plaintiff's son a Free Appropriate Public Education (FAPE) in violation of the IDEA. Subsequent to this decision, plaintiff requested a subsequent due process hearing. The matter was assigned Cause No. 2001-SE-0078 and was ultimately dismissed upon plaintiff's request. The record also reveals that plaintiff initiated three other due process hearings involving the Morton School District under Cause Nos. 2002-SE-0049, 2001-SE-0033, and 2003-SE-0030.

Plaintiff makes light of the rule barring plaintiffs from pursuing a judicial remedy before they exhaust their administrative remedies under the IDEA. *See Robb v. Bethel School District*, 398 F.3d 1050 (9th Cir. 2002). The Ninth Circuit in *Robb* decided that even where the IDEA's ability to remedy a particular injury is unclear, exhaustion is required to give educational agencies an initial opportunity to ascertain and alleviate the alleged problem. *Id.* at 1050. The relief available to plaintiffs may not always be in the precise form that they prefer. *Id.* at 1049.

A careful review of the record reveals that plaintiff failed to exhaust her claims relating to emotional distress. Consequently, defendants were never afforded the opportunity to remedy her claims despite the fact that defendants concede that "[a] remedy was potentially available to her in an administrative forum." Defs. Supp. Reply at 2. To proceed in District Court, exhaustion of these issues is required. An alternative argument simply remains unsupported.

As such, the Court finds that plaintiff has failed to meet of [sic] her burden of establishing subject matter jurisdiction.

ACCORDINGLY;

IT IS HEREBY ORDERED:

(1) Defendants' Motion to Dismiss (Dkt. #11) is **GRANTED**;

(2) Defendants' Motion to Strike Plaintiff's Unauthorized Surreply Documents (Dkt. #18) is **STRICKEN** from the Court's Calendar as **MOOT**;

(3) The Clerk of the Court is directed to send copies of this Order to counsel for plaintiff and defendants.

DATED this 18th day of July, 2003.

FRANKLIN D. BURGESS
UNITED STATES
DISTRICT JUDGE